

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

BOLLINGER ELECTRIC, INC.

Employer

and

Case 4–RC–21448

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 375, AFL-CIO¹

Petitioner

**REGIONAL DIRECTOR’S DECISION
AND DIRECTION OF ELECTION**

The Employer, Bollinger Electric, Inc., performs electrical and plumbing work from its Allentown, Pennsylvania facility. The Petitioner, IBEW Local 375, seeks to represent a unit of the Employer’s Foremen, Journeyman Electricians, and Electrician Helpers. The Employer contends that the Foremen should be excluded as supervisors. The Petitioner’s proposed unit consists of 18 employees, and the Employer’s proposed unit would include 14 employees.²

A Hearing Officer of the Board held a hearing, and both parties filed briefs. After considering the evidence and the arguments presented by the parties, I have concluded, in agreement with the Employer, that the Foremen are supervisors within the meaning of the Act, and therefore, I shall exclude them from the bargaining unit.

¹ The Petitioner’s name appears as amended at the hearing.

² In the construction industry, the *Daniel-Steiny* formula is used to determine the eligibility of employees, absent agreement of the parties. See *Signet Testing Laboratories, Inc.*, 330 NLRB 1 (1999); also see *Daniel Construction Co.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992). In this case, the parties stipulated that notwithstanding the fact that the Employer is engaged in the construction industry, the Board’s standard eligibility formula should apply.

The parties agreed to include in the unit the four Journeyman Electricians who serve as Service Technicians -- Donald Huber, Ralph Walter, Gerald Felise, and Keith Lewis. The parties also agreed to include the following employees: Journeyman Electricians John Brill and Michael Fritz and Electrician Helpers Malek Fahl, Jason German, Brian Hill, Michael Spalding, William Torres, Kimberly Ueberroth, Brian Walker, and Jonathan Wert.

To provide a context for my discussion, I will begin this Decision with a brief overview of the Employer's operations. I then will review the factors that must be evaluated in determining whether the Foremen are supervisors within the meaning of Section 2(11) of the Act. Next, I will present the relevant facts and analysis as to their supervisory status.

I. OVERVIEW OF OPERATIONS

The Employer's co-owners are William Dietrich and Robert Bollinger, and the Commercial Estimator, Richard Owen Pyron Jr., reports to them. Dietrich, Bollinger, and Pyron serve as the Employer's Project Managers and together comprise the Employer's management team.

The next highest-ranking individuals are the Foremen, who report to the Project Managers on their jobs. Normally one Foreman works on each job. The Employer's Foremen currently are Christopher Fries, Gregory Konsevitch, Kenneth Dean Weikel, and John Schiffner.

Until August 17, 2007, the Employer employed Michael Hine as a Field Superintendent, but the position has not been filled since he left the Employer's employ. Hine assigned employees daily to work on specific jobs and was responsible for overall quality control on the projects. Since the Field Superintendent position was eliminated, the Project Manager and the Foremen have assumed these responsibilities.

The remaining employees who perform electrical work are Journeyman Electricians and Electrical Helpers. Four of the Journeyman Electricians serve as residential or commercial Service Technicians, and they generally perform service work rather than construction work. The other two Journeyman Electricians work on construction sites. There are eight Electrical Helpers. On an average construction job, a Foreman will have about four or five employees working under him, although there may be as few as one or as many as nine employees.

II. FACTORS RELEVANT TO EVALUATING SUPERVISORY STATUS

Supervisors are specifically excluded from coverage under the National Labor Relations Act. The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001); *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Dean & DeLuca*, above at 1047 (2003). Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River*, above at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Kentucky River*, above at 713; *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994); *Juniper Industries*, above. The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. See *Children's Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 3 (2006); *Avante at Wilson, Inc.*, 348 NLRB No. 71, slip op. at 3 (2006). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Kanahwa Stone Co.*, 334 NLRB 235, 237 (2001); *Gaines Electric*, 309 NLRB 1077, 1078 (1992).

In *Oakwood Healthcare*, above, *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), the Board decided a series of cases clarifying the standards to be applied in determining whether individuals exercise sufficient discretion in assigning and directing work to be viewed as supervisors with the meaning of Section 2(11) of the Act. The term “assign” refers to the “act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, above, slip op. at 4. The assignment of work to other employees, pursuant to plans and schedules developed by an admitted statutory supervisor, fails to establish that the employee assigning the work is a statutory supervisor. See *Arlington Electric Inc.*, 332 NLRB 845, 845-846 (2000).

In *Oakwood Healthcare*, the Board explained the term “responsible direction” as follows: “If a person on the shop floor has ‘men under him’ that person is a supervisor, provided that the direction is both responsible . . . and carried out with independent judgment.” “Responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. *Oakwood Healthcare*, above, slip op. at 5-6. But an individual will be found to have the authority to responsibly direct other employees only if the individual is accountable for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Oakwood Healthcare*, above, slip op. at 7.

Assignment or responsible direction will produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Oakwood Healthcare*, above, slip op. at 8. Independent judgment requires that the decision “rise above the merely routine or clerical.” *Ibid*.

III. FACTS

Overall Authority

After the Employer receives a solicitation from a general contractor to bid on a job, one of the Employer’s Project Managers prepares an estimate based on labor, materials, and overhead costs, and submits a bid for the work. If the Employer is awarded the project, the Project Manager chooses a Foreman to run the job. Foremen are not required to accept all jobs offered to them by the Project Manager, although they generally do so. A Foreman who decides that he does not want the job will be put on another job. If a Foreman has completed a project and no other desirable job is available, he may temporarily work as a Journeyman Electrician on another jobsite but he is paid at the Foreman rate. Fries serves as a Foreman at least 95 percent of the time, and Weikel has served exclusively as a Foreman since becoming one over three years ago.

When the Foreman is first assigned to a project by the Project Manager, the Project Manager reviews the plans and specifications with him and answers any questions. Thereafter, the Project Manager works with and assists the Foreman as needed.

When the job commences, the Foreman goes to the jobsite and meets with the general contractor's representative; the Project Manager may or may not accompany the Foreman. The Foreman then starts coordinating how to perform the work. He determines the best route and method for running conduits and copper wire, how much labor it will take to install them, and the quantity of materials that will be needed.³ He also determines how many employees he wants to start the job, and he may discuss with the Project Manager which employees should be assigned. Foreman Weikel usually asks initially for two employees who do "roughing" work, i.e., running and strapping metallic cable and hanging device boxes. Next, the Foreman starts laying out the job, which means examining the blueprints, locating the service, coordinating the excavation, and compiling a list of materials and equipment to order for the project. The way the job is laid out impacts the number of man-hours necessary to do the job and the cost of material.

The Project Manager generally is on a jobsite about once every two weeks, although they prefer to appear more frequently. At the jobsite, the Project Manager receives updates from the Foreman as to how the job is progressing and supports him as needed. He may question the

³ The Foreman may use PVC conduits (polyvinyl chloride), or EMT conduits (electrical metallic tubing), but PVC is much less expensive.

Foreman as to why he is performing the work in a particular way. When the Project Manager is present, he is the Employer's jobsite representative, in addition to the Foreman. Otherwise, the Foreman is the Employer's day-to-day representative and highest-ranking official on the jobsite.

The Project Manager usually attends weekly or bi-weekly job meetings with the owner's representative, the general contractor, and a representative from each subcontractor, and the Foreman attends when the Project Manager is unavailable. At these meetings, the participants discuss the progress of the job and scheduling matters.

The Project Manager initially orders materials through a purchasing agent, including lighting fixtures, switchgears, electrical panels, fire alarm systems boxes, conduits, and fittings. The Foreman is basically in charge of ordering the materials after the initial order and generally calls in a list of materials each week to the purchasing agent to be ordered without higher approval. This authority requires him to make decisions, within the specifications of the project, as to what types of materials are needed in what quantity, and these choices will affect the cost of the project.⁴ Materials are generally received twice a week from the Employer's warehouse or a supply house. The Foreman ensures that the materials are properly stored at the jobsite, and if he orders too much material, he is responsible for returning the extra material to the shop.

The Foreman decides how many man-hours are needed for a job, and his decision may differ from the Project Manager's estimate. In making this decision, the Foreman takes into account how he lays out the job, when he will receive the materials, to whom he assigns the tasks, and how many hours of overtime are needed. After the project begins, the Foreman informs the Project Manager how many employees are needed for what period of time, and he generally receives the number of employees that he requests. The Foremen often request specific employees by name, and these requests are generally granted. He also may decide that he does not need an employee who has been assigned to the job and will contact the office to have the employee assigned elsewhere. The Foreman is responsible for completing the project within the Project Manager's estimated hours for the job. If the Project Manager discovers that a job is nearing the number of man-hours allotted, he advises the Foreman, and if the man-hours exceed the estimate, the Project Manager will review with the Foreman why this occurred and what could have been done differently.

The Foreman has the authority to determine the hours that employees normally work. Employees typically work eight-hour days from 7:00 a.m. to 3:30 p.m. with a half hour for lunch. However, Foreman Weikel typically sets the starting time at 8:00 a.m. but changes it twice a week to 7:00 a.m. without management approval.

The Foreman works within the schedule of the general contractor and keeps the general contractor informed about the status of his work. He coordinates with the foremen for the other trades on the project as to the sequence of the work.

⁴ If materials are needed immediately, the Foreman may personally travel to a supply house to obtain them without prior approval.

The extent to which the Foremen personally perform hands-on work depends on the size of the job. If the Foreman works by himself or with only one other employee, he works with tools about 75 to 80 percent of the time. When he has two employees under him, a Foreman spends about 40 to 50 percent of his time working with tools. He will work with tools about 20 to 50 percent of the time on a more typical four-employee job and about 20 percent of the time on a five-employee job. The Foreman spends the rest of his time ordering materials, coordinating work with the general contractor and the other trades, doing administrative tasks and paperwork, laying out the job, assigning work and advising employees how to perform it, checking completed work, and testing receptacles.

The Foreman is responsible for ensuring the safety of the job. He must adhere to the National Electrical Code, but he may apply stricter standards. He ensures that ladders are safe, extension cords are not frayed or pinched, and employees are using tools properly. Every employee is responsible for safety, and the Employer conducts bi-weekly meetings with all employees where safety topics are covered. The Employer has a safety manual which is available in the office but is not distributed to the employees. If there is an accident, the Foreman is responsible for completing an accident report.

The Foreman has a duty to rectify electrical safety violations as soon as possible. An employee who discovers a safety violation is to report it to the Foreman for correction, unless the employee is in immediate danger and must fix the problem at once. The Foreman is accountable for correcting safety problems and can be disciplined for failing to do so, although there is no evidence that discipline has ever been imposed for such transgressions.

The Foreman is responsible for making on-site changes requested by the general contractor and may agree to do so without permission from the office if the changes cost less than about \$500. If changes are made, which happens often, the Foreman is responsible for providing a set of plans to the general contractor at the end of the job that reflect what he has installed on the job, called an “as-built” drawing.⁵

Employees complete their own time cards. At the end of the week, the Foreman collects the time cards, verifies their accuracy, initials them, and turns them in to the office so the information can be recorded. The Foreman deals with employees directly concerning time card problems.

When the project is completed and the Foreman has determined that it is ready for inspection, the Foreman calls the office to contact the relevant inspection agency. The Foreman is responsible to make sure that all work is performed properly so that the Employer’s work passes the inspection. If there is a problem revealed at the inspection, the Foreman is required to find the error and correct it. Foremen are not punished for employee errors, although Project Managers have spoken with them about failed inspections.

⁵ An “as-built drawing” is a blueprint of a job showing the placement of all electrical items.

Every two to three months, the Employer holds a meeting for all of its Foremen to discuss the progress of ongoing jobs, the status of upcoming projects, what the Foremen can do to perform better in the field, problems with employees, materials issues, and new products.

Assignments, direction of work, and training

Normally, the Foreman speaks with the project's general contractor each day to see what work the Employer needs to perform. Then, the Foreman determines where the electrical equipment should be installed in each room and delegates this work to the employees. He tells the employees what he needs them to do and how he wants it done. For example, the Foreman tells employees where he wants to run wires, how he wants the wires tied to a box, and how many straps are needed. The Foreman personally monitors how these tasks are performed by the employees. He makes sure that the job is completed on schedule, that there is enough manpower on the job, and that the employees have enough work to do each day. The Foreman regularly reports back to the Project Manager as to the progress on the job.

The Foreman assigns work independently, without seeking the Project Manager's approval, based on his knowledge of the employees and their capabilities. He bases his decision on his personal experience working with these employees and observing and evaluating their skills, mechanical abilities, and limitations. When assigning work, the Foreman considers the employee's experience at particular tasks and whether the employee can be trusted not to have an accident. In particular, the Foreman must determine what tasks to assign the Electrician Helpers, and some Electrical Helpers have minimal levels of electrical experience while others are approaching Journeyman status. All of the Journeyman Electricians can do most electrical work. Sometimes the Foreman will ask for the input of the employees as to the work they would like to perform.

The Foreman determines the order in which the employees on the jobsite perform their tasks and is responsible for checking to make sure that the work he assigned to employees is completed in a satisfactory manner. In this connection, Foreman Weikel has advised employees that they were not grounding lights properly so he had them redo their work. The Foremen also make sure employees label items accurately.

Foremen are responsible for training employees in the field. If the Foreman has the time, he personally provides on-the-job training to new employees. The Foreman may also assign an Electrician Helper to learn from a more knowledgeable employee.

Authority over working hours

Foremen and other employees are paid overtime pay for working more than 40 hours per week. The Foremen determine whether overtime is needed on the jobsite and how many employees should work overtime, but overtime is voluntary and cannot be required by the Foremen. Normally the Foreman seeks volunteers to work overtime, and if no employees at the site volunteer, the Foreman will call the office and one of the Project Managers will solicit volunteers from other jobs.

If an employee wants to leave early, the employee speaks to the Foreman. The Foreman has the authority to deny such a request, but there is no evidence that this authority has ever been exercised. If an employee is going to be late to work, the employee calls the Foreman and informs him, and the Foreman then reports it to the office.

Foremen do not have the authority to approve sick leave. If an employee needs to be out sick, the employee either calls the Foreman, who notifies the office, or directly calls the office. If an employee is absent without having called in, the Foreman will call the office to report it and request a replacement employee, if necessary. Employees fill out vacation request forms and submit them to the Foremen, who in turn submit them to Dietrich or Bollinger for approval.

Hiring, discipline, and discharge

Co-owners Dietrich and Bollinger are responsible for hiring, and Foremen do not participate in this process. They, like any employee, may make hiring recommendations.

If an employee causes problems on a jobsite, the Foreman has the authority to send the employee back to the shop, and the incident is noted on the employee's record. If the problems result from a personality conflict, the employee may be sent by the Employer to another jobsite. Foremen also have the authority to remove problem employees from their jobs entirely, and this occurs several times a year. If an employee has a work performance problem or other problem with a Foreman, the employee is sent to another jobsite and observed by the Foreman on that job, and if problems recur, the employee likely will be discharged by Dietrich or Bollinger. In January 2008, after employee Justin Current failed to report for work, Foreman Konsevitch asked Commercial Estimator/Project Manager Pyron not to send Current to his jobsite anymore, and Pyron sent a replacement. In about October 2004, Foreman Konsevitch sent a frequently tardy employee back to the shop and then informed former Job Superintendent Hine what he had done.

The record describes several incidents in which Foremen sent employees home or removed them from their jobsites. About four years ago, Foreman Weikel required a new employee to leave the jobsite after the employee attacked him with a cordless drill. About six years ago, Schiffner told an employee to leave the job because he made a messy pile of wire and then cursed at him. When Dietrich and Bollinger's father, David, who then was a co-owner of the Employer, saw the mess, they terminated the employee. As a Foreman, a position he held until his promotion two years ago, Pyron sent an employee off the job twice for intoxication and sent another employee who was overly medicated home for job performance problems.

There is one example of a Foreman personally discharging employees. About seven years ago, David Bollinger hired four or five employees pursuant to telephone interviews and gave Foreman Schiffner discretion as to which ones to retain or discharge. Schiffner sent most of these employees home at lunchtime on their first day of employment because of their lack of knowledge, and they never worked for the Employer again.

Foremen also have the authority to issue verbal warnings to employees if, for example, the employees do not follow instructions. In this connection Foreman Weikel once told an

employee that he was taking too long to run some conduit, but the matter was resolved without the need for further discipline. There is no evidence that these warnings are recorded or otherwise part of the Employer's disciplinary processes.⁶ If necessary, the Foreman can refer a disciplinary problem to the office.

Foremen may recommend to Dietrich and Bollinger that an employee be suspended or discharged. Dietrich and Bollinger make the final decision, but the Foreman's recommendation may weigh very heavily in the decision. Foremen are not involved in layoffs.

Evaluations

New employees receive a 90-day review and then receive annual reviews. Dietrich and Bollinger prepare these reviews after questioning the relevant Foreman about the employee's work quality, aggressiveness, desire to learn, and need for improvement. They use the information provided by a Foreman as part of the decision-making process as to the amount of the raise the employee is to be given.

There are three pay levels for Electrician Helpers and two levels for Journeyman Electricians. Dietrich and Bollinger decide on what level to place each employee after asking the Foremen for their opinions. For example, before an annual review of employee Michael Spalding, Dietrich spoke to Weikel, Spalding's Foreman for the past year or two. Weikel gave his recommendation, and the pay raise Spalding later received was basically consistent with that recommendation. In early May 2008, Foreman Weikel discussed with employee Jonathan Wert the latter's concern about the size of his most recent pay increase, and Weikel gave Dietrich his opinion about the matter. Dietrich looked into it and decided to give Wert an additional pay increase. Foremen themselves receive annual reviews which may result in pay increases.

Compensation

Foremen are hourly paid at a rate \$2.50 or \$3.00 more per hour than the highest-level Journeyman Electrician.⁷ Unlike other employees, they also participate in a bonus program. Prior to 2008, Foremen received yearly bonuses of between \$350 and \$1,000 based on their job performance and the Employer's overall performance. The Employer implemented a new bonus program for Foremen, on January 1, 2008, with the approval of the Foremen, to provide them with incentives to perform their work better. Under this program, the amount of the Foreman's bonus is linked to the success of his jobs, based on a six-month review. In evaluating performance, the Employer uses a complex system in which it considers factors such as: the number of man-hours needed to complete a project compared to the estimated number of man-hours; how many times a week materials are delivered to the jobsite; whether the jobs pass inspection; whether there are warranty repairs; and safety incidents. For example, if a job estimated to require 1000 man-hours requires only 950 man-hours, the Foreman receives a \$200 bonus. Foremen receive a "red check" if the job requires more than two materials deliveries per week or if warranty repairs are needed, and excessive red checks may result in deductions from

⁶ Weikel testified that he has never disciplined an employee.

⁷ The record does not indicate the specific wages of any of the Employer's employees.

their bonuses. For each job that fails inspection, a Foreman will lose \$30 from his bonus, and for each safety problem up to three per year, the Foreman will lose \$75, plus \$500 for more than three incidents. The first review under the new program will be held at the end of June 2008.

Until recently, the Employer provided Foremen Fries, Konsevitch, and Weikel with the use of company cars to drive to and from their jobsites, but the Employer recently stopped this practice, for the most part, and instead compensates them \$12 per day for their transportation costs.⁸ Service Technicians are on-call 24 hours per day so the Employer provides them with company cars, but other Journeyman Electricians and Electrical Helpers do not receive company cars or other compensation for transportation.

Foremen receive the same health benefits and same vacation benefits as other employees. Foremen and the other employees wear the same T-shirts and slacks.

IV. ANALYSIS

I find that the Employer has met its burden of establishing that the Foremen are supervisors within the meaning of Section 2(11) of the Act based on their authority to assign work, responsibly direct employees, and discipline employees using independent judgment.

Work assignment

The Foremen have considerable overall authority and independence at the jobsite. Although the Project Managers are in overall charge of the jobs, they are not present at the jobsite for the vast majority of the time, and the Foremen are usually the highest-ranking officials there. The Foremen decide how many employees are necessary to complete the job, they often work with employees that they have requested by name, and they determine what hours the employees will be working each day. They lay out the jobs, decide which tasks need to be performed at which times, and assign the tasks at their jobsites without direction from the Project Managers or anyone else. Significantly, Foremen use their discretion in selecting who will perform which tasks, basing these decisions on their personal knowledge of the employees' skills and experience, among other factors. See *Oakwood Healthcare*, above; cf. *Loyalhanna Care Center*, 352 NLRB No. 105 (2008). This discretion often involves consideration of safety risks, because some of the assigned work involves live electrical equipment. In this connection, although working on a live receptacle, for example, may be routine for a Journeyman Electrician, such work is not routine for an inexperienced Electrician Helper, and the Foreman must decide whether the employee knows how to perform the task safely.⁹ Thus, the Foremen do not assign work in accordance with an employer's set practice, pattern, or parameters or solely based on

⁸ At the time of the hearing, however, Weikel was using a company vehicle to transport employees to a job which is a considerable distance from the office.

Schiffner never was given the use of a company vehicle.

⁹ In this connection, it bears emphasis that the four foremen work at the jobsites with only two Journeyman Electricians and eight Electrician Helpers, so by necessity, Electrical Helpers must perform a lot of the work.

such obvious factors as equalizing workload, but must use independent discretion. Accordingly, Foremen exercise supervisory authority in assigning work. *RCC Fabricators, Inc.*, 352 NLRB No. 88, slip op. at 1 (2008); cf. *Alstyle Apparel*, 351 NLRB No. 92, slip op. at 1 (2007).

In *Croft Metals*, above, and *Shaw, Inc.*, 350 NLRB No. 37 at 2-3 (2007), the Board found that disputed individuals were not supervisors, based, in part, on its determination that they did not use independent judgment in making work assignments. These cases, however, are distinguishable from the instant case. In *Croft Metals*, the leadpersons had authority over employees who performed the same tasks daily on the production line or in their department pursuant to a posted schedule prepared by non-leadpersons. In loading trucks, the leadpersons followed a pre-established delivery schedule and generally employed a standard loading pattern. The production and maintenance employees generally performed the same repetitive tasks on a regular basis and, once trained in their positions, required minimal guidance. The leadpersons occasionally switched the employees' tasks but did not give them significant overall duties, and they mostly worked alongside them. In contrast with *Croft Metals*, the Foremen in this case must consider and evaluate the skills and experience of the employees when assigning and directing their work. Additionally, the employees in this case have more varied and dangerous tasks to perform, and the Electrician Helpers in the crew may be too inexperienced or unreliable to handle live equipment. The Foremen have far more independence and authority at their jobsites and exercise a significantly greater degree of discretion than the leadpersons in *Croft Metal*.

Similarly, in *Shaw*, most of the assignments involved tasks that were recurrent and predictable and were carried out in conformance with conceded supervisors' specifications and oversight. Foremen in *Shaw* were given a sheet prepared by upper management listing the names of the employees assigned to their crews, and they worked side-by-side with the other crew members, in accord with specifications given to them by their supervisors. Since each day's job essentially determined the crew's composition, a foreman's designation of which crew member would perform particular functions was often based on the employee's trade designation or known skills and was thus essentially self-evident. Further, much of the work in *Shaw* was unskilled, and the foremen routinely rotated routine and somewhat repetitive tasks among the many laborers in the crew to vary their work and equalize their burdens. In contrast, the record does not show that the electrical work in this case is routine and repetitive, and Foremen are not constrained by higher-level supervisors in making these assignments.

Responsible Direction

The Foremen are in charge of crews numbering from two to nine employees, and they must ensure that these crews complete the work in an efficient, timely, and satisfactory manner. In addition to assigning employees their overall responsibilities, they regularly assign them to discrete tasks, such as roughing work or running wires. They lay out the job, determine when each task should be performed, decide which employee should perform the job based on their evaluation of the employees' skills and experience, and ensure that the task is performed properly. This direction rises above the "routine or clerical" and requires the exercise of independent discretion. See, e.g., *Abramson, LLC*, 345 NLRB 171, 192 (2005). Cf. *Croft Metals*, 348 NLRB No. 38, (2006), slip op. at 6.

As discussed above, in *Oakwood Healthcare, Inc.*, above at 7, the Board emphasized that for direction to be “responsible,” the asserted supervisor must be held accountable for the performance of work by others, such that there are adverse consequences to the purported supervisor if the employees do not perform their tasks properly. This concept of accountability was meant to create a clear distinction between employees whose interests align with management and those employees whose interest is simply the completion of certain tasks.

Significantly, the Foremen receive bonuses based on the performance of the employees on their jobsites and the decisions they make as to how to use these employees. Thus, their bonuses are tied to the number of man-hours of employees on the job, which in turn hinges on their decisions about how many employees to request and whether to offer them overtime work. Bonuses are also tied to the quality of the work that they oversee because money is deducted if the job fails inspection or requires warranty calls. The Foremen are also held accountable for safety; they lose money for each safety violation on their jobsites. The Foremen’s own evaluations, which are tied to wage increases, also are based on the performance of the employees at their jobsites. This specific showing of adverse consequences befalling the Foremen if the tasks on the jobsite are not properly performed satisfies the *Oakwood* “accountability” standard for purposes of responsible direction. See *Croft Metals*, above at 6; cf. *Alstyle Apparel*, above. Indeed, the Board has previously found a similar bonus provision to be a major factor in finding electrical foremen to be supervisors. *Rogers Electric, Inc.*, 346 NLRB 508, 513-514 (2006). Accordingly, Foremen hold the authority “responsibly to direct” employees, another of the supervisory functions listed in Section 2(11).

Discipline and Discharge

Foremen have the authority to issue “verbal warnings,” but there is no evidence that the Employer maintains records of such warnings or that they have any impact on employee job status. Rather, the purported warnings appear simply to be corrections to the employees’ work. The authority to issue low-level discipline, such as oral warnings, does not, in and of itself, demonstrate supervisory authority. *Norton Audubon Hospital*, 350 NLRB No. 57 at 16 (2007). In these circumstances, I do not find that the Foremen are statutory supervisors by virtue of their authority to issue verbal warnings. *Shaw, Inc.*, 350 NLRB No. 37 slip op. at 4, fn. 21; *Beverly Enterprises v. NLRB*, 148 F. 3rd 1042, 1046 (8th Cir. 1998).¹⁰

The Employer also has not met its burden to demonstrate that Foremen have the authority to discharge employees or effectively to recommend discharge. The only example in the record of a Foreman making the decision to discharge an employee was when Foreman Schiffner exercised his authority to discharge any of a group of employees who had been hired that day over the telephone. This incident occurred about seven years ago, and the record otherwise indicates that Dietrich and Bollinger make all discharge decisions. The single, remote incident is insufficient to show that Foremen currently have the authority to discharge employees. Cf.

¹⁰ See also *Croft Metals*, above at 4, in which the Board found that the leadpersons’ role in discipline did not meet the definition of “supervisor” in Section 2(11) of the Act, although a leadperson, inter alia, verbally warned an employee for not wearing protective equipment.

Metropolitan Transportation Services, Inc., 351 NLRB No. 43, slip op. at 5 (2007). With respect to effective discharge recommendations, although the owners may rely on the recommendations of Foremen, the record does not provide specific examples demonstrating that they typically follow these recommendations without independent investigation. *Norton Audubon Hospital*, above at 16; *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). Cf. *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004). Accordingly, I do not find that the Foremen have the authority to discharge, or effectively recommend the discharge of, employees.

On various occasions over the years, Foremen have sent employees away from their jobsites, or requested that employees not be assigned to their jobsites. They have done so based on employee attendance infractions and personality problems, among other things, and the record indicates that these incidents occur several times each year and the Employer maintains records of them. Sometimes Foremen have sent employees back to the office for reassignment, but if more than one Foreman does not want the employee on his job, the employee may be discharged. For specific examples, in about October 2004, Foreman Konsevitch sent an employee with tardiness issues back to the office, and more recently, Konsevitch requested that an employee not return to his jobsite because of attendance problems and that request was granted. Several years ago, Foreman Weikel sent an employee home for attempted assault, and Foreman Schiffner sent an employee home because the employee left a mess and then cursed at him. Additionally, former Foreman Pyron removed various employees from his jobsite for reasons such as poor work performance, intoxication, and overmedication.

Sending employees home for misconduct is typically considered evidence of supervisory authority, although an exception exists where the authority is limited to cases of egregious misconduct. *Bredero Shaw, a Div. of Shawcor, Ltd.*, 345 NLRB 782, 783 (2005). In *Bredero Shaw*, the Board found an act of minor insubordination, i.e., getting “smart” with the asserted supervisor, did not involve egregious misconduct and concluded that the authority to send an employee home for such conduct established supervisory status. In the instant case, not all of the conduct that caused Foremen to remove employees from the jobsites was egregious, as some incidents involved attendance and personality issues. While the record is unclear as to whether employees removed from jobsites by Foremen lost pay, removal from the jobsite itself is an exercise of supervisory authority. See *Garney Morris, Inc.*, 313 NLRB 101, 114 (1993), enf. 149 LRRM 2960 (3rd Cir. 1995).¹¹ I therefore find the Foremen’s authority to send employees from their jobsite to constitute the authority to impose discipline within the meaning of Section 2(11) of the Act.

Other authority

While there was testimony that Foremen have the authority to determine whether employees at their jobsites may come in to work late or leave early, there is no evidence that a Foreman has ever denied such a request or that their granting of such requests requires independent discretion. They have no authority with respect to sick leave or vacation days other than to report absences to the office. See *Shaw’s, Inc.*, above, slip op. at 4. Therefore, I do not

¹¹ In that case, the authority to remove an employee from the jobsite was one of the significant factors relied on by the Board in finding a foreman to be a supervisor.

rely on their authority to approve leave or to permit employees to leave early or come in late in finding them to be supervisors.

Foremen have the authority to determine when overtime work is warranted and to offer the work to employees at their jobsites, but no authority to compel them to work -- overtime is strictly voluntary. The Board has held that there is no independent judgment in the decision to assign overtime or the choice of employees to work overtime where overtime is voluntary. *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998). Their authority over overtime, therefore, does not establish supervisory status.

The 90-day reviews and annual evaluations of Journeyman Electrician and Helpers are not performed by the Foremen but by the company owners. In preparing these reviews, the owners first seek input from the Foremen and question them closely about the employees' strengths and weaknesses, and their views are among the considerations used to determine the contents of the evaluations. Additionally, the owners consult the Foremen in determining whether to advance the employees' pay levels, and Foremen have presented their views as to the size of employee wage increases. However, although there is evidence that the Employer's owners have, at times, heavily relied on the opinions of the Foremen, the record is not clear as to the weight ordinarily accorded their views. I do not rely on the Foremen's role in evaluations since their input did not solely result in personnel actions affecting the employees' wages or job status. See *Norton Audobon Hospital*, above at 16; *Croft Metals*, above at 4. Also see *Northeast Utilities Service Corp. v. NLRB*, 35 F. 3rd 621, 624 (1st Cir. 1994).

Secondary indicia

The Board holds that secondary factors of supervisory status only should be considered if primary indicia of supervisory status enumerated in Section 2(11) have been found to exist. *RCC Fabricators*, above at 14, fn. 28. In this case, in addition to the primary factors discussed above, there are secondary indicia suggesting that the Foremen are supervisors. Thus, Foremen are paid more than the other employees and receive bonuses, unlike the other employees. See *Sam's Club*, 349 NLRB No. 94, slip op. at 8 (2007); *Debber Electric*, 313 NLRB 1094, 1096 (1994); *McClatchey Newspapers, Inc.*, 307 NLRB 773 (1992). Also, three of the four Foremen receive a daily transportation allowance of \$12 per day when not driving a company car, which other employees do not get. Foremen sometimes are the Employer's sole representative at job meetings, and they also attend Foremen's meetings where, inter alia, employee issues are discussed. Additionally, the Foremen are generally the Employer's highest-ranking officials at the jobsite. See *Loyalhanna Care Center*, above; *Garney Morris*, above at 114. Foremen have the authority to order and return materials based on their own judgment and initiative. *Adco Electric, Inc.*, 307 NLRB 1113, 1126 (1992), enf'd. 6 F 3rd 1160 (5th Cir. 1993). Also, Foremen determine if they need more employees on the job. *Debber Electric*, above. In sum, they possess several of the secondary indicia used to help determine supervisory status. *Rogers Electric*, above at 514.

Conclusion

Based on the above, I find that the Foremen are statutory supervisors and are excluded from the unit. *RCC Fabricators*, above; *Oakwood Healthcare*, above at 2-9.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Journeyman Electricians and Electrician Helpers employed by the Employer, **excluding** other employees, plumbers, plumber helpers, truck driver, office clerical, office manager, receptionist, purchasing agent, customer service representatives, vocational - technical student, Foremen, managerial employees, confidential employees, guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **International Brotherhood of Electrical Workers, Local 375, AFL-CIO**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); see *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the **full** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106-4404 on or before **July 18, 2008**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658 or by electronic filing through the Agency's website at www.nlr.gov. Guidance for electronic filing can be found under the **E-Gov** heading on the Agency's website. Since the list will be made available to all parties to the election, please furnish a total of two (2) copies, unless the list is submitted by facsimile or electronic mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three **(3)** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five **(5)** working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by electronic filing through the Agency's website at **www.nlr.gov**. A copy of the request for review must be served on each of the other parties to the proceeding and with the Regional Director, either by mail or by electronic filing. Guidance for electronic filing can be found under the **E-Gov** heading on the Agency's website. This request must be received by the Board in Washington by 5:00 p.m., EDT on **July 25, 2008**.

Signed: July 11, 2008

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]

DOROTHY L. MOORE-DUNCAN

Regional Director, Region Four
National Labor Relations Board